Supreme Court, U.S.
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No. 10-83

IN THE

Supreme Court of the United States

GARY E. PEEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

* *Counsel of Record*

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, the government can ban non-obscene materials that do not depict actual children and which therefore are not intrinsically related to the sexual abuse and exploitation of children.

2. Whether, consistent with the *Ex Post Facto* Clause, the government can ban materials that previously enjoyed the protection of the First Amendment.

PARTIES TO THE PROCEEDING

The parties below were (1) Gary E. Peel and (2) the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Gary E. Peel respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1a-22a) is reported at 595 F.3d 763. The order of the Seventh Circuit denying the combined petition for rehearing and rehearing en banc (Pet. App. 45a-46a) is unreported. The pertinent orders and opinions of the district court are unreported and are reproduced at Pet. App. 23a-44a.

JURISDICTION

The Seventh Circuit issued its decision on February 12, 2010. On March 15, 2010, the Seventh Circuit denied Petitioner's timely filed combined petition for rehearing and rehearing en banc. Justice Stevens extended the time for filing a petition for certiorari to August 12, 2010. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

Section 2252A(c), Title 18, United States Code, provides:

> (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that —
>
> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
>
> (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors.

Article I, Section 9, Clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

On March 23, 2007, a federal jury found Petitioner Gary E. Peel guilty of, *inter alia*, two counts of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The photographs that Petitioner was convicted of possessing were thirty-three-year-old Polaroids that he had taken in his home state of Illinois of a sixteen-year-old woman with whom he had been having a consensual sexual relationship. At the time, in 1974, the age of consent in Illinois was sixteen.

Moreover, at the time the pictures were taken, there was no federal child pornography law. It was not until the late 1970s that Congress passed the

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). That statute made it illegal to use a minor to engage in sexually explicit conduct for the purpose of producing a visual image of such conduct knowing that it would be transported in interstate or foreign commerce, but did not prohibit the mere possession of child pornography. The Act defined "minor" as an individual under the age of sixteen.

Seven years later, Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, which changed the definition of "minor" to any individual under the age of eighteen. Like the previous legislation, this statute did not apply to mere possession of child pornography.

It was not until 1990 that Congress extended the federal child pornography laws to cover possession of sexually explicit images of minors. *See* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, 104 Stat. 4816. As a result, Petitioner's possession of the photographs became illegal under federal law for the first time some sixteen years after they were taken.

In 2006, Petitioner was indicted for possessing the photographs. He argued at trial that he could not be convicted of possession of child pornography because the subject of the photographs was an adult at the time they were taken. The district court took judicial notice of the fact that the age of consent for sexual activity in Illinois in 1973 and 1974 was sixteen, and so instructed the jury. Nonetheless, Petitioner was found guilty, and the district court

entered a judgment of conviction against him on November 19, 2007.

Petitioner filed a notice of appeal on December 4, 2007. After initial briefing by both counsel and Petitioner *pro se*, the court of appeals struck all previously filed briefs and appointed new counsel. The court ordered counsel to brief several issues, including the following:

> With respect to Mr. Peel's convictions for possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) —
>
> a. Whether the government's evidence was sufficient to support Mr. Peel's convictions where the images in question were sexually explicit photographs of a sixteen-year-old female taken prior to the enactment of a federal criminal statute regulating child pornography, as defined to cover any person under the age of eighteen years?
>
> b. Whether Mr. Peel complied with the procedural requirements for asserting the affirmative defense available under 18 U.S.C. § 2252A(c), and if not, what is the effect of such noncompliance?

Section 2252A(c) sets forth an affirmative defense to the charge of possession of child pornography where "the alleged child pornography was produced

using an actual person or persons engaging in sexually explicit conduct" and "each such person was an adult at the time the material was produced," or "the alleged child pornography was not produced using any actual minor or minors."

In his appeal, Petitioner argued that the affirmative defense entitled him to a judgment of acquittal on the child pornography counts. He asserted that although he did not file a formal notice of his intention to invoke the affirmative defense, as the statute requires, he should not be deemed to have waived that defense, because he consistently maintained at trial that the subject of the photographs was an adult at the time they were taken, and thus gave the government ample notice that he planned to contest the child pornography charges on this ground. Substantively, Petitioner contended that "at the time the material was produced," in 1974, the subject was an "adult" under both state and federal law, as she was above the age of consent in Illinois, and there was no federal child pornography statute.

The court of appeals affirmed Petitioner's child pornography convictions. It characterized Petitioner's argument as asserting that the affirmative defense "grandfather[s] the possession of pornography that was legal when it was created." Pet. App. 11a. The court then rejected that interpretation of the affirmative defense:

> The history makes clear that the affirmative defense was not added to the statute in order to grandfather

> pornography created before the definition of a child was changed from younger than 16 to younger than 18. It was added to exculpate child pornography made with adult rather than child models, at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government.

Pet. App. 14a. Despite its acknowledgment that the affirmative defense was "added to exculpate child pornography made with adult rather than child models," the court of appeals did not address Petitioner's assertion that the subject of the photographs in his case was, in fact, an adult at the time they were taken. Pet. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

This is a child pornography case that does not involve a child. Even though it was undisputed at trial and on appeal that the photographs Petitioner was convicted of possessing depicted a young woman who was above the age of consent for sexual activity, and therefore recorded no child sexual abuse or exploitation, the court of appeals affirmed Petitioner's conviction for possession of child pornography. The decision conflicts with this Court's

decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which made clear that non-obscene materials that do not depict the sexual victimization of actual children enjoy First Amendment protection. It also raises serious *ex post facto* concerns.

I. The Decision of the Court of Appeals Conflicts with This Court's Decision in *Ashcroft v. Free Speech Coalition*.

A. As Applied to Petitioner, Section 2252A(a)(5)(B) Violates the First Amendment.

It is well-established that child pornography does not enjoy the protection of the First Amendment. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that although adult pornography can be banned only if obscene, child pornography can be proscribed whether or not obscene under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). The Court explained that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," and that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." 458 U.S. at 757-58. The distribution of child pornography can be banned, the Court held, because it is "intrinsically related to the sexual abuse of children" insofar as it stands as a permanent record of the children's abuse and creates incentives for the production of material that requires the sexual exploitation of children. *Id.* at 759. Thus, the *Ferber* Court's ruling upholding the ban on child pornography was rooted in "the State's particular and more compelling interest in

prosecuting those who promote the sexual exploitation of children." *Id.* at 761.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court made clear that the First Amendment does not permit the prohibition of child pornography whose production does not involve child sexual abuse and exploitation. The statute at issue in *Free Speech Coalition*, the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, Div. A, Title I, § 101(a), 110 Stat. 3009-26, 18 U.S.C. § 2251 *et seq.*, extended the federal child pornography laws to sexually explicit images that appeared to depict real minors but were produced using youthful-looking adults or computer graphics.

This Court observed that "[b]y prohibiting child pornography that does not depict an actual child, the [CPPA] goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process." *Id.* at 240 (citation omitted). The Court explained that *Ferber* upheld a ban on the prohibition on the production, distribution, and sale of child pornography because, first, as a permanent record of a child's abuse, the continued circulation of the images would harm the child depicted in them, and second, the State had an interest in closing the distribution network for child pornography, since the traffic in such images was an economic motive that encouraged its production. *Id.* at 249-50 (citing *Ferber*, 458 U.S. at 759-60). "Under either rationale, the speech had what the Court in effect held was a

proximate link to the crime from which it came." *Id.* at 250.

The Court then considered *Osborne v. Ohio*, 495 U.S. 103 (1990), which held that the same governmental interests articulated by the *Ferber* Court justified a ban on the possession of pornography produced by using actual children. Although the *Osborne* Court "noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors," the *Free Speech Coalition* Court said, it "anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.'" 535 U.S. at 250. The Court emphasized that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice." *Id.*

Applying these principles to the CPPA, the Court rejected the argument that child pornography that was not produced using real children nonetheless could be banned because it caused indirect harms.

> In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily

> follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

Id. (internal citations omitted). These reasons "in support of limiting the freedom of speech," the Court held, "have no justification in our precedents or in the law of the First Amendment." *Id.* at 256. Accordingly, it struck down the CPPA as violative of the First Amendment.

The court of appeals' affirmance of Petitioner's child pornography conviction in the face of uncontroverted evidence that the subject of the photographs was an adult at the time of their production runs afoul of *Ashcroft v. Free Speech Coalition*. Unlike the images in *Ferber*, Petitioner's photographs are not "intrinsically related to the sexual abuse of children." 458 U.S. at 759. Indeed, they have nothing at all to do with child sexual abuse, as they were taken in the course of a relationship between consenting adults. And like the images at issue in *Free Speech Coalition*, the thirty-year-old Polaroids Petitioner was convicted of possessing "record[ed] no crime" and "create[d] no victims by [their] production." 535 U.S. at 250. Therefore, they cannot be banned consistent with the First Amendment. The court of appeals' decision to the contrary conflicts squarely with *Free Speech Coalition*, and this Court should hear and reaffirm this well-established precedent.

B. The Affirmative Defense Does Not Save the Statute from Constitutional Challenge.

The affirmative defense found at 18 U.S.C. § 2252A(c) does not render § 2252A(a)(5)(B) constitutional as applied to Petitioner. As an initial matter, it is far from clear that such a defense can save a statute from constitutional challenge. In *Free Speech Coalition*, the government defended the CPPA based in part on an affirmative defense available under the statute that allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. 535 U.S. at 255. This Court observed that the "Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Id.* It noted that "[a]n affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." *Id.* That certainly was true in this case.

Even if an affirmative defense could save a statute from constitutional challenge, the court of appeals' decision essentially eviscerated the defense. Petitioner interpreted the affirmative defense to permit him to prove that the subject of the photographs was an "adult at the time the material was produced." 18 U.S.C. § 2252A(c)(1)(B). Such a showing would demonstrate that the production of those photographs did not implicate child sexual abuse or exploitation that would justify banning

them despite their non-obscene nature. Consistent with that interpretation of the affirmative defense, Petitioner maintained at trial, and the district court agreed, that the subject of the photographs at issue was above the age of consent at the time the pictures were taken. On appeal, Petitioner renewed his assertion that the subject of the photographs was an "adult" at the time they were produced, and argued that the affirmative defense therefore relieved him of criminal liability.

The court of appeals failed to address this argument, however. To be sure, it aptly observed that "the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, and only the presence of that abuse . . . justifies the suppression of pornography that does not cross the line to obscenity." Pet. App. 13a (citing *Free Speech Coalition*, 535 U.S. at 250-51). But rather than confronting Petitioner's argument that "no child was involved" in the pictures in this case, the court of appeals set up a straw man argument (that the affirmative defense was meant to preserve the legality of sexually explicit materials that were legal when made) that it then proceeded to knock down. In doing so, it exacerbated the First Amendment concerns raised by this case. This Court should not leave this constitutionally problematic ruling in place.

II. The Decision of the Court of Appeals Raises Serious *Ex Post Facto* Concerns.

The court of appeals' decision also raises significant *ex post facto* concerns. When Petitioner took the photographs at issue in 1974, there was no child pornography law. Congress' first child pornography statute, enacted in 1977, extended only to the production and distribution of sexually explicit images of individuals under the age of sixteen. Not until 1983 did Congress amend the child pornography statute to apply to sexually explicit images of individuals under the age of eighteen. And it was not until 1990 that Congress criminalized the mere possession of child pornography. With the passage of that statute, Petitioner became subject to criminal prosecution for possessing materials that previously were not only legal, but which, in light of *Ferber*, he had every reason to believe were constitutionally protected.

This Court considered an analogous situation in *United States v. Juvenile Male*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940). That case involved a defendant who was adjudicated a delinquent after he pled "true" to non-consensual sexual acts with a ten-year-old child. After his adjudication and sentencing, Congress passed the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, 120 Stat. 590, 42 U.S.C. § 16901 *et seq.* (2006), which requires individuals who have been adjudicated delinquent for certain serious sex offenses to register as sex offenders and to keep their registrations current in each jurisdiction where they live, work, and attend school. The Attorney General

subsequently issued an interim rule that SORNA's requirements apply to "all sex offenders," even those adjudicated delinquent after the passage of the statute. After the district court in *Juvenile Male* ordered the defendant to register as a sex offender and to keep his registration current, he appealed.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the registration order violated the *Ex Post Facto* Clause. The court of appeals reasoned that the registration requirement imposed retroactive punishment insofar as it "makes public information about sex offenders that would otherwise permanently remain confidential and exposes persons who were adjudicated delinquent years before to public humiliation and ignominy for the first time." *United States v. Juvenile Male*, 590 F.3d 924, 935 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940). Thus, "individuals who *twenty or thirty years ago* pled true to acts of juvenile delinquency — and who did so with the expectation that their adjudication would remain confidential — may, decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors." *Id.* (emphasis in original). The government filed a petition for certiorari, but this Court reserved further proceedings pending a response to a certified question from the Supreme Court of the State of Montana.

This case presents *ex post facto* concerns analogous to those in *Juvenile Male*. Petitioner took the photographs at issue, and kept them for years, "with the expectation" that they were protected by

the First Amendment, because they depicted non-obscene sexually explicit conduct by an adult. *Id.* The subsequent criminalization of possession of child pornography, and the redefinition of child pornography to include sexually explicit images of sixteen- and seventeen-year-olds who had achieved the age of majority at the time the photographs were taken, subjected him to prosecution, "public humiliation and ignominy for the first time." *Id.* The Court should grant the petition for a writ of certiorari in this case or, because of the similarities between this case and *Juvenile Male*, hold it pending a ruling on the petition in that case.

III. The Court of Appeals' Decision Has Potentially Wide-Ranging Effects.

The facts of Petitioner's case are unusual and perhaps even unique. He took nude photographs of a young adult woman with whom he was having a consensual sexual relationship and kept them for more than thirty years, during which time a federal law classifying the pictures as child pornography was passed, and was finally prosecuted for possessing them three decades after their creation. But the decision below has effects far beyond Petitioner's case.

First, the court of appeals' decision creates a strange situation in which some individuals may legally engage in sexual activity (or even marry) but may not photograph themselves doing so. This Court alluded to this incongruity in *Free Speech Coalition*, in which it noted that the CPPA banned images of individuals who appear to be under eighteen. "This is

higher than the legal age of marriage in many states, as well as the age at which persons may consent to sexual relations." 535 U.S. at 247 (citing sources). Indeed, because the child pornography statutes prohibit images of "simulated" as well as actual sex, *see* 18 U.S.C. § 2256(2)(A), it is even possible that it would be legal for an actor above the statutory age of consent to engage in *real* sexual activity, but illegal for him to film (or possess as film of) himself simulating sex. Such a reading of the statute is wholly unsupported by the First Amendment or this Court's precedents.

Second, it is entirely possible, and indeed probable, that the court of appeals' decision makes illegal significant quantities of artistic and scientific works that reside not only in libraries, museums, movie studios, and other institutions, but in home DVD collections, on the Internet, and on personal computers and an ever-growing number of electronic hand-held devices. As this Court observed in *Free Speech Coalition*, "teenage sexual activity and the sexual abuse of children . . . have inspired countless literary works" that have substantial social value. 535 U.S. at 247 (citing Shakespeare's *Romeo and Juliet* and numerous contemporary films). Such works may include sexually explicit images of actors and models who were adults under the applicable law at the time of production but are now classified as minors as a result of subsequent statutory changes. Unless the possessors of this material can invoke the affirmative defense in 18 U.S.C. § 2252A(c), they will be "subject to severe punishment without inquiry into the work's

redeeming [social] value." 535 U.S. at 248. As this Court held in *Free Speech Coalition*, that would be inconsistent with the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a writ of certiorari or, in the alternative, hold it pending a ruling on the petition for a writ of certiorari in *United States v. Juvenile Male*, No. 09-940.

Respectfully submitted,

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

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* *Counsel of Record*